HON'BLE SHRI G.S.SINGHVI, THE CHIEF JUSTICE
AND
HON'BLE SHRI JUSTICE C.V.NAGARNUNA REDDY

WRIT PETITION No. 12781 OF 2006

Between:

M/s. J.K. Communications,
Represented by its Managing Partner
Mr. J. Sridhar Rao.

... Petitioner

AND

The Telecom Regulatory Authority of India,
New Delhi & others.

... Respondents

Counsel for the petitioner : Shri M.S. Chandresh

Counsel for respondent Nos.1&2 : Shri A. Rajashekar Reddy
Assistant Solicitor General

Counsel for respondent Nos.3&4 : None

: ORDER :

September 28th 2006

Per C.V.Nagarjuna Reddy, J

In this petition, the petitioner has questioned the vires of Telecommunication (Broadcasting and Cable Services) Interconnection Regulations, 2004, issued by the Telecom Regulatory Authority of India, the 1st respondent, and order dated 20.06.2006 passed by the Telecom Disputes Settlement and Appellate Tribunal (2nd respondent herein) in M.A.No.72 of 2006 in petition No.49(C) of 2006.

The petitioner is a partnership firm established in the year 1996. It is engaged in the business as a Multi System Operator (MSO) supplying signals of satellite television channels to other M.S.O's, cable operators and households through cable. The petitioner is registered as a M.S.O. under Sections 3 and 4 of Cable Television Networks (Regulation) Act 1995 (for short "the 1995 Act"). It is a distributor for several television channels viz., Gemini Television, Teja Television, Eenadu Television and MAA Television for the entire Srikakulam Town covering all the surrounding villages. The petitioner provides pay channel telecast by the above satellite channels to about 33 cable operators, who in turn provide cable television network to their subscribers numbering about 25,000. The petitioner's business is regulated by the 1995 Act and other enactments including the Telecom Regulatory Authority of India Act, 1997 ("the TRAI Act" for short). Most of the service providers, who started operating their television channels through free to air basis in the beginning, have made their channels as pay channels. The signals of such pay

channels are encrypted by the broadcasters/satellite channel and the desired cable operators/M.S.O's had to obtain signals which have to be decrypted. The broadcaster issued decoders to their agents/distributors to decrypt the signals. Thereafter, signals were decrypted by such agents/distributors and supplied to other M.S.O's, cable operators and households/subscribers. The 4th respondent – Ushodaya Enterprises Limited, which was providing free to air channel until recently, took a decision to convert their free to air channel into pay channel some time in October, 2005 and called for applications from the intending M.S.O's/cable operators for obtaining decoders and viewing cards for the purpose of decrypting the signals of Eenadu Television. The petitioner among others made an application for obtaining decoders and viewing cards. After considering the experience, establishment, infrastructure, connectivity and other attributes of the petitioner, the 4th respondent issued the decoders and viewing cards to the petitioner for the purpose of decrypting the signals of E.TV and E.TV2. The 4th respondent issued a letter dated 31.01.2006 stating that it has appointed the petitioner as its distribution agent for the signals of E.TV and E.TV2. The petitioner, thereafter, entered into a subscription agreement dated 02.01.2006 with the 4th respondent and in pursuance of the same, it was given decoders, viewing cards (SIM cards) for the entire area of Srikakulam Town and surrounding villages. Apart from the initial investments made, the petitioner invested further amount for the expansion of its business and agreed to pay the 4th respondent for a connectivity of about 14,700 subscribers.

Respondent No.3, who could not succeed in persuading the

4th respondent to supply decoders, filed a petition before the 2nd respondent by alleging that the decision of the 4th respondent not to supply decoders to it was discriminatory. By an order dated 27.02.2006, the second respondent granted the application and passed the following order:

> "Learned counsel for the respondent seeks permission to file the reply to the petition. Permission granted. Reply taken on record.
>
> Learned counsel for the petitioners submit when the petitioner is willing to give the information sought for by the respondent at para-10 of the reply filed today before the Tribunal, to the extent of providing address of the subscribers only with regard to the demand made sub para C&F of para 10 it cannot give any reply where as on date petitioner is not received ETV signals. The learned counsel for the respondents in this regard that it would suffice if the petitioner files an affidavit to the effect that it was receiving signals earlier. If the petitioner complies with the above requirement the respondent is directed to give temporary decoders to the petitioner within one week of the receipt of the said information."

In pursuance of that order, the 4th respondent supplied decoders and viewing cards to the 3rd respondent.

In the affidavit filed on behalf of the petitioner, it has been averred that order dated 27.02.2006 is vitiated due to violation of the rules of natural justice and is liable to be quashed on that ground because respondent No.2 neither issued notice nor gave it an opportunity of hearing. It has been further averred that indiscriminate supply of decoders by the 4th respondent would lead to an unfair and unhealthy competition amongst M.S.Os, who are receiving signals from the 4th respondent. Still further, it has

been averred that the action of the 4th respondent to supply decoders and viewing cards to the 3rd respondent has adversely affected its business in Srikakulam District.

According to the petitioner, by obtaining decoders and viewing cards, the 3rd respondent has, in fact, usurped a part of area of operation of the petitioner and has also transgressed into other areas which are not covered by the subscription agreement between the 3rd and 4th respondents.

The petitioner has also challenged the powers of the 1st respondent to frame the 2004 Regulations. According to the petitioner, by making those regulations, the 1st respondent is virtually forcing/determining the relationship between the broadcaster and the operators/M.S.O for which it has no power. The broadcaster is not included within the definition of 'Telecommunication Service' under Section 2(k) of the TRAI Act and the power to include the broadcaster within the definition of telecommunication is conferred on the Central Government and not on the 1st respondent.

The stand taken by respondent No.1, as is discernible from the affidavit of Sri Rakesh Kacker, Advisor (Broadcasting and Cable Services), Telecom Regulatory Authority of India, is as under:

(i) Through Notification No.AO 44(E) and 45(E) dated 09.01.2004 issued under proviso to Section 2(1)(k) of the TRAI Act, 1997, the Government of India notified 'Telecommunication Service' as comprising 'Broadcasting Services' and 'Cable Services'.

(ii) The definition of 'Service Provider' given in Section 2(1)(j) of the TRAI Act is not an exhaustive definition, but is an inclusive definition. The words 'in this Act, unless the context otherwise requires' make it amply clear that in the context of cable services, the broadcasters and cable operators are service providers. The definition of 'Service Provider' has also been suitably amplified in the impugned regulations.

(iii) The powers of the respondent No.1 under Section 36 of the TRAI Act are to be read in conjunction and harmony with respondent No.1's substantive powers under Section 11 of the TRAI Act, which in turn provides for specific powers and functions of respondent No.1 and these powers include fixing the terms and conditions of interconnectivity between the service providers. Since the cable operators are notified as telecommunication service providers, they are squarely covered by the provisions of Section 11 and therefore, are subjected to regulations made by the respondent No.1.

The stand taken by the 3rd respondent is more or less similar to the one taken on behalf of respondent No.1.

We have heard learned counsel for the parties. The 1997 Act was enacted to provide for the establishment of Telecom Regulatory Authority of India and the Telecom Disputes Settlement and Appellate Tribunal to regulate the telecommunication services, adjudicate disputes, dispose of appeals and to protect the interests of service providers and consumers of the telecom

sector, to promote and ensure orderly growth of the telecom sector and for matters connected therewith or incidental thereto.

The 1st respondent has been constituted under Section 3 of the TRAI Act. Section 11(1)(a) of the said Act enumerates the functions of the 1st respondent which *inter alia* include to fix the terms and conditions of licence to a service provider, take measures to facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in such services and measures for the development of telecommunication technology and any other matter relatable to telecommunication industry in general. Section 11(1)(b)(iv) envisages that the 1st respondent shall regulate arrangement amongst service providers of sharing their revenue derived from providing telecommunication services. Under Section 11(1)(d), the 1st respondent shall perform such other functions including such administrative and financial functions as may be entrusted to it by the Central Government or as may be necessary to carry out the provisions of this Act. While under Section 35, the Central Government is empowered to make rules for carrying out the purposes of the Act, under Section 36, the 1st respondent is empowered to make regulations consistent with the Act and rules made thereunder to carry out the purposes of the Act. Section 2(j) defines 'Service Provider' as the Government as a service provider and includes a licensee.

The term 'Telecommunication Service' is defined under Section 2(k), which it is apt to extract hereinbelow:

> "'Telecommunication Service' means service of any description (including electronic mail, voice mail, data services, audio tex services, video tex

services, radio paging and cellular mobile telephone services) which is made available to users by means of any transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature, by wire, radio, visual or other electro-magnetic mean but shall not include broadcasting services;

(Provided that the Central Government may notify other service (sic any other service) to be telecommunication service including broadcasting services.)"

In exercise of the power vested in it under Section 36 of the 1995 Act, the 1st respondent framed the 2004 Regulations. Regulation 3.1 of the 2004 Regulations envisages that no broadcaster of TV channels shall engage in any practice or activity or enter into any understanding or arrangement, including exclusive contracts with any distributor of TV channels that prevents any other distributor of TV channels from obtaining such TV channels for distribution and under Regulation 3.2 every broadcaster shall provide on request signals of its TV channels and non-discriminatory terms for all distributors of TV channels, which may include, but be not limited to a cable operator, direct to home operator, multi system operator, head ends in the sky operator; multi system operators and to the cable operators on a non-discriminatory basis.

From an analysis of the provisions of the 1997 Act, it is evident that with a view to regulate and streamline the activity pertaining to telecommunication services, which were expanding at a fast pace, the said enactment is made. While the 1st respondent is entrusted with the task of regulating the activity connected with the communication services, the 2nd respondent is

made an arbiter of the disputes arising under the provisions of the 1997 Act. Though Section 2(k) excluded broadcasting services from the definition of "telecommunication services", it contains a proviso under which the Central Government is empowered to notify other services including broadcasting services to be telecommunication services.

The contention that since Section 2(k) of TRAI Act excluded the term 'broadcaster' from the definition of 'telecommunication service', the inclusion of 'broadcaster' in the definition of 'service provider' under Regulation 2(n) is ultra vires the powers of the 1st respondent is mentioned only to be rejected.

As noted hereinabove, the Central Government through its notification No.S.O.44(E) dated 09.01.2004 notified the broadcasting services and cable services to be telecommunication services. Once the cable service becomes a part of telecommunication services, the former will be squarely comprehended by the provisions of Section 11(1)(iv) of the Act. The 1st respondent is empowered under Section 36(1) of the Act to make regulations consistent with the Act and the rules made thereunder in order to carry out the purposes of the Act. One of the purposes of the Act is to regulate the telecommunication services as mentioned in the long title of the Act. As already noted, the functions of the 1st respondent include measures to facilitate a competition and promote efficiency in the operation of the telecommunication services so as to facilitate the growth in such services. As the cable services are brought within the purview of the telecommunication services vide Government of India's notification dated 09.01.2004, it is well within the powers

and functions of the 1st respondent to regulate these cable services which undoubtedly constitutes one of the purposes of the 1977 Act. The specified areas with respect to which the 1st respondent is vested with the power to make regulations under Section 32(2)(a) to (f) of the Act are only illustrative and not exhaustive as could be seen from the language of Section 36(2), which reads "in particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters."

The definition provision under Section 2(1) of the Act commences with a caveat "unless the context otherwise requires". On more than one occasion the Apex Court considered the effect of similar expressions used as a prefix to the definition sections. In **M/S. DHANDHANIA KEDIA & CO., v THE COMMISSIONER OF INCOME TAX**[1] the supreme Court considered the true purport of the definition of "previous year" under Section 2 (11) of the Income Tax Act 1922 (as amended in 1939) and Section 13 of the General Clauses Act 1897, which contains the words "unless there is anything repugnant in the subject or context". The Supreme Court held that since the context in which the definition "previous year" was used in the Income Tax has a different connotation, the definition under the General Clauses Act cannot be straight away adopted. In **THE VANGUARD FIRE AND GENERAL INSURANCE CO., LTD., MADRAS v M/S. FRESER AND ROSS AND ANOTHER**[2] it is held as under:

> "It is well settled that all statutory definitions or observations must be read subject to the qualification variously expressed in the definition clauses which

created them and it may be that even where the definition is exhaustive inasmuch as the word defined is said to mean a certain thing, it is possible for the word to have a somewhat different meaning in different sections of the Act depending upon the subject or the context. That is why all definitions in statutes generally begin with the qualifying words namely, unless there is anything repugnant in the subject or context."

The Court further held:

"In view of this qualification, the Court has not only to look at the words but also to look at the context, the collocation and the object of such words relating to such matter and interpret the meaning intended to be conveyed by the use of the words under the circumstances. Therefore, though ordinarily the word "insurer" as used in the Act would mean a person or body corporate etc., carrying on the business of insurance, it may be that in certain sections the word may have somewhat different meaning."

In **SPECIAL OFFICER & COMPETENT AUTHORITY, URBAN LAND CEILINGS, HYDERABAD & ANOTHER v P.S.RAO**[3] the Supreme Court considering the words "unless the context otherwise requires" in the definition clause of the Urban Land (Ceiling and Regulation) Act 1976 held that the word "hold" used in Section 20(1)(a) of the Act cannot have the same meaning as the words "to hold" as defined in Section 2(l), as the said words were used in Section 20(1)(a) in a different context. It was held therein that the adoption of the definition in Section 2(l) in the context of Section 20 makes the provisions of Section 20 unworkable and otiose.

Keeping in view the purposes of the Act and the notification

issued by the Central Government by exercising its power given to it by the proviso to Section 2(k) of the Act by including broadcasting and cable network services under the definition 'telecommunication service', the two categories are included within the definition, 'service provider' by the 1st respondent in the 2004 Regulations. Therefore, in the context of regulating the cable network services, the 1st respondent has provided for a different definition of "service provider" from the one originally incorporated in Section 2(j) of the Act. Though, superficially considered, there appears to be a conflict between the two definitions of 'service provider' under the Act and the regulations, and on a harmonious construction of the Act and the Regulations, such a conflict disappears. The ultimate purpose for which a broader spectrum of definition is provided under the Regulations being to regulate the activities of the cable operators which, as already held, is one of the functions of the 1st respondent, in the context of carrying out such a purpose, a varied definition of 'service provider' provided for in the regulations cannot be said to be ultra vires the powers of the 1st respondent.

We are therefore of the firm view that the 1st respondent is well within its powers to make regulations as they did by framing the 2004 Regulations to bring the cable services within the definition of the service provider for the purposes of regulating the activities of the cable operators though the definition 'service provider' under Section 2(j) of the Act is restrictive in its scope.

It is brought to our notice that a learned Single Judge in W.P.Nos.27978 of 2005 and 768 of 2006 considered a similar issue and upheld the vires of the Regulations. We have gone

through the said judgment and we are entirely in agreement with the views expressed by the learned Single Judge in the said judgment.

For the aforementioned reasons, challenge to the vires of the 2004 Regulations cannot be sustained and accordingly the same is rejected.

As regards the plea of the petitioner that the 2nd respondent should not have passed orders dated 27.02.2006 and 20.06.2006, it is apposite to mention that the said orders are interim in character. The main petition filed by the 3rd respondent is still pending. Therefore, it is appropriate to await the adjudication of the main petition. That apart, in view of our finding that the 2004 Regulations cover the cable operators and the same are not violative of any statutory provision, the jurisdiction of the 2nd respondent to decide the dispute raised by the 3rd respondent cannot be questioned. In any case, if the petitioner feels aggrieved by the order impugned in this writ petition, it will be open to it to move the 2nd respondent for vacation of the said order. As this remedy is available to the petitioner, we decline to pronounce on the merits of the issues in the writ petition. We are, therefore, inclined to dismiss the writ petition while relegating the petitioner to the jurisdiction of the 2nd respondent.

For the aforementioned reasons, the writ petition is devoid of any merit and substance and the same is dismissed subject to the observations made above. No costs.

As a sequel to the dismissal of the writ petition, W.P.M.P.No.15874 of 2006 is also dismissed.

C.V.NNAGARJUNA REDDY, J

28th September, 2006

G.S.SINGHVI, CJ

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[1] AIR 1959 SC 219

[2] AIR 1960 SC 971

[3] (2000) 2 SCC 451